International Law in Crisis: Reaffirming the Rule of Law in a Divided World†

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> It is the law of love that rules mankind. Had violence, that is, hate, ruled us, we should have become extinct long ago. And yet, the tragedy of it is that the so-called civilised men and nations conduct themselves as if the basis of society is violence.
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> – Mohandas Gandhi.
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> Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied to a single garment of destiny. Whatever affects one directly, affects all indirectly.
>
> – Martin Luther King, Jr.

I am deeply honored to have been invited to hold the Tunku Abdul Rahman Chair in International Law at the University of Malaya. As we celebrate the 50th anniversary of Merdeka, it is fitting that this lecture be dedicated to the memory of our beloved Bapak Malaysia.

Tunku Abdul Rahman was not only the father of our independence, he was also a widely-respected world statesman. As

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the principal architect of the Association of South East Asian Nations (ASEAN) and one of the original leaders of the Organisation of the Islamic Conference, he worked tirelessly to bring nations, cultures and religions together to promote greater peace. Most importantly, the Tunku strongly believed in the Rule of Law as the guiding principle for States in the conduct of their international relations.

It is against this background of the Tunku's rich legacy in international affairs that I have chosen as the subject of my lecture today, *International Law in Crisis: Reaffirming the Rule of Law in a Divided World*. I would like to reflect on this crisis and emphasise the urgent need to reaffirm the Rule of Law in a needlessly divided world.

Our world is blessed with a prosperity and abundance that are unmatched in the history of mankind. Yet, we have never been poorer in spirit and humanity.

We live in a borderless world promising to bring nations and peoples of diverse cultures and religions closer. Yet conflicts and crises continue to tear us apart.

And, since 11 September 2001, we have been conditioned by a culture of fear spawned by a terrifying act of terrorism and then fed by a so-called "war on terror."

It is during such challenging times that the Rule of Law is put to its greatest test – and, sadly at this moment, it has been disregarded by a number of States in the conduct of their international relations.

By the "Rule of Law", I mean to refer to the primacy of rules in the conduct of international relations and the settlement of disputes. The "rules" are the principles of international law as reflected in international treaties, custom or state practice, the general principles of law recognised by civilised nations and judicial decisions.

In 1945, even before the dogs of war were caged, plenipotentiaries from 50 nations gathered in San Francisco to lay the

foundation of the United Nations (UN) and hammer out a new vision for peace. This grand enterprise involved refashioning some of the old rules of international law to create a new law of peace, justice, human rights, respect for other States and active promotion of their development. That represented a dramatic shift away from an international law that had been shaped by conflict, conquest, colonialism and exploitation of the powerless by the powerful.

Thus, under the new UN Charter, the founding Member States:

- *declared their determination to save succeeding generations from the scourge of war...*
- *dedicated themselves to establishing conditions under which justice and respect for obligations arising from treaties can be maintained ... and*
- *promised to promote universal respect for, and observance of, human rights and fundamental freedoms for all ...*

Most importantly, the Charter also outlawed the threat or use of force by Member States. In its place, the Charter established a new international community-based collective security system for the maintenance of international peace, and Member States made a commitment to the peaceful settlement of disputes.

Over the past 62 years, the rules enshrined in the Charter have been supplemented by a huge body of international treaties and conventions. They cover many key areas of human affairs including especially human rights, disarmament, fair trade and the protection of the environment.

This, then, is the broad legal framework for my reflections on the crisis we face today. I am fully conscious that the interpretation and application of international law rules are influenced to a large degree by politics and national interests. But I do firmly believe that politics and national interests can never justify the abandonment or any significant deviation from the rules of international law.

You may well ask: Why and where is the Rule of Law in international relations under threat? Consider some of the following points of crisis:

- The international community's repeated failure to act or to act in time when faced with human rights catastrophes around the world.
- The re-emergence of the ugly head of unilateralism in the threat or use of force by several States to resolve disputes and threats to international peace and security.
- The so-called "war on terror" that has confounded countries and distracted them from fighting more important "wars" against poverty, disease and ignorance.
- The growing incidence of acts of torture, which violate international humanitarian law.
- The rapid proliferation of nuclear weapons and other weapons of mass destruction (WMDs) which has significantly increased the risks of a nuclear holocaust.
- The disturbing complacency shown by countries in the face of the most serious environmental crisis facing the planet today - global warming.

To me, these developments signal a growing disengagement from some of the fundamental principles of international law. This is most surprising because, never in the history of mankind, has the world been better armed with a more formidable arsenal of international treaties and conventions, customary international law and judicial decisions. It is equally surprising that the offenders include some of the major developed countries and even some in our own region such as Myanmar, which also brings back bitter memories of Tiananmen Square, Tibet and the killing fields of Cambodia.

I want to focus today, first, on how the civilising principles of international law have been dangerously eroded and, secondly, on the need to reaffirm the Rule of Law in the face of these onslaughts. I

will do this by reference to the six points of crisis that I have just mentioned:

1. Human rights

If there is one civilising ideal that testifies to the humanity of our generation, it is the tremendous progress made in developing a massive body of international human rights law. First, there was the Universal Declaration of Human Rights in 1948. This was then followed by the two International Covenants on Human Rights in 1966 and numerous other human rights treaties. Yet, it is one of the curious ironies of our times that there has also been a dangerous increase in violations of human rights around the world.

While the primary responsibility for the protection of human rights properly rests with countries, international law has gradually recognised that, where violations of human rights are so widespread and serious and a country fails to act, the international community (acting through the UN) must step in to help as it did, for example, in the case of *apartheid* in South Africa.

Look at Darfur. This situation stares us in the face as the worst humanitarian crisis in the world today. Here, a long and bloody civil war has resulted in the indiscriminate killings of entire civilian communities, torture, forced disappearances, forced displacements, rape, sexual slavery and even branding of molested women. As recent events have shown, the ill-equipped African Union peacekeepers are unlikely to be able to restore order in Darfur any time soon. Why have we, as an international community, been so slow to act?

Look also at the genocide that took place in Rwanda and shocked the conscience of the world. Here again, why were we, as an international community, so slow to act?

When you consider that well over a half a million, and possibly close to a million lives, have been lost in each crisis, we must ask ourselves again: Why did the United Nations fail to act?

And let us also not forget the ethnic cleansing and brutalities perpetrated against Muslims in Bosnia-Herzegovina and against people of Albanian origin in Kosovo by the late President Milosevic in Yugoslavia. Here, the Security Council was unable to take decisive action and it took NATO bombing, which was not authorised by the Security Council, to bring these crises to an end.

Last but not least, why does the Palestinian problem remain unresolved after more than a half a century? Why have so many Security Council Resolutions and peace accords been violated? Why has the international community been unable to resolve this problem? This is an indictment of the international community for its failure to show its humanity and to uphold the Rule of Law.

But before we cast stones elsewhere, let us also look in our own backyard. Just in the past couple of weeks, we have watched in horror as the junta in Myanmar gunned down many barefoot and unarmed Buddhist monks, whose only crime was to march peacefully to plead for a return to democracy and basic human rights in their country. And Aung San Suu Kyi, the Nobel Peace Prize-winning democratically-elected leader of Myanmar has remained under house arrest for seventeen years. Why have we, as an international community been so slow to act?

In particular, it is regrettable that ASEAN has stayed relatively silent, limiting its role to behind-the-scenes diplomacy that has borne little fruit. Finally, last week, ASEAN issued a strong statement expressing revulsion over recent events and called for an end to the oppression. I was pleased to read that our Foreign Minister has just spoken out strongly on this matter. But the question still remains: Why was ASEAN, our own regional community, so slow to demonstrate leadership by insisting on greater respect for human rights in a neighboring member country?

China and India, the two largest countries in our region and the world, should also be taken to task for continuing to do business with this dictatorship and not being more vigorous in their opposition to the recent crackdown. India's hands-off approach is particularly

disappointing considering that it is the world's largest democracy and that it had earlier supported the pro-democracy movement. It appears that both China and India have been giving higher priority to the protection of their substantial business interests in Myanmar – especially access to oil and gas and their arms sales to the junta.

Fortunately, there are some silver linings to this dark cloud that hangs over the enforcement of human rights worldwide. Three important developments provide some hope for the future:

The first is the establishment by the UN of *ad hoc* or special international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Lebanon, East Timor and Cambodia, to prosecute some of the former political and military leaders of these countries for war crimes, crimes against humanity or genocide. Among those prosecuted so far are the late former Yugoslavian President Milosevic and former Liberian President Charles Taylor and a number of Serbian generals.

Second, in 1998, 120 States, meeting in Rome, adopted the Statute establishing the new International Criminal Court. This Court was conferred jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes, and aggression. The Court, now based in The Hague, became operational in 2002 and has begun prosecuting several former political and military leaders from Darfur, the Congo, Uganda and the Central African Republic. Parenthetically, I might add here that although the Clinton administration had signed the Statute, the present US administration took the unusual step of withdrawing the signature of the US from this Statute.

Third, a number of national courts have taken bold steps to extradite former political leaders to their countries to face trial for gross human rights abuses during their rule. These courts have rejected claims of immunity by these former leaders. Among those who have been extradited are the late General Augusto Pinochet of Chile and former President Alberto Fujimori of Peru. On the other hand, it is unfortunate that Japan had earlier chosen to provide a safe haven to Fujimori on the ground that he is also a Japanese national entitled to protection against extradition.

A final glimmer of hope has also come recently from the proposal of a new norm of international law called the Responsibility to Protect. This proposed norm provides that:

> there is a collective international responsibility to protect, exercisable by the Security Council, authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law, which sovereign Governments have proved powerless or unwilling to prevent.

This norm was initially developed by the Canadians and endorsed in 2005 by the *UN Secretary General's High-Level Panel on Threats, Challenges and Changes*. If finally accepted, as it should be, this norm would replace the more controversial doctrine of "humanitarian intervention", originally used to justify unilateral and often abusive interventions.

2. Unilateralism

Article 2.4 of the UN Charter prohibits Member States from the threat or use of force in their international relations. The primary responsibility for the maintenance of international peace and security is vested in the Security Council. The use of force was only to be permitted when a State exercised an inherent right of self-defence against an armed attack under Article 51 of the Charter or when the Security Council undertook enforcement action under Chapter VII of the Charter.

These new prescriptions were intended to bring to an end, once and for all, the unbridled unilateralism and aggression that led to two World Wars and the demise of the League of Nations. The new multilateral framework was designed to replace an era of gunboat diplomacy with an objective international community-based collective security system.

However, in numerous instances, the UN's multilateral framework for dealing with threats to international peace and security under the aegis of the Security Council has been bypassed. Let me just mention a few examples below.

In the 1980s in Nicaragua, the US had engaged in clandestine operations to secretly arm the *contras*, placed land mines in the harbors of Nicaragua and bombed oil installations, port facilities and a naval base in an attempt to destabilise and overthrow the Sandinista government. Nicaragua took the US to the World Court, which delivered a landmark decision that the acts complained of violated rules of customary international law not to use force against another State, not to intervene in its internal affairs, and not to violate its sovereignty. The Court rejected the US claim that it had acted in collective self-defence. The decision was a victory for the Rule of Law and indirectly for the collective security system of the UN.

In 1990, Saddam Hussein invaded Kuwait in clear violation of the UN Charter. The UN Security Council condemned this act of aggression and authorised the US to take military action to repel this aggression. Operation Desert Storm was successful in driving out the Iraqi forces and restoring Kuwait's sovereignty and independence.

Following the September 11 terrorist attacks, the so-called "Coalition of the Willing", led by the US and supported by the United Kingdom (UK) and a number of other countries, declared war and invaded two sovereign States, Afghanistan and Iraq. The use of force against Afghanistan was implicitly authorised by UN Security Council Resolution 1373 as a legitimate exercise of the right of self-defence under Article 51 of the Charter.

On the other hand, the invasion of Iraq, without the prior authorisation of the Security Council, was widely viewed as a violation of the Charter principles mandating a multilateral approach to dealing with threats to international peace and security under the authority of the Security Council.

This disregard for the role of the Security Council was particularly surprising because the US had actively participated in several meetings and decisions on the Iraq situation in the Council. The US left the table to act unilaterally only when it became clear that a majority of the members of the Security Council, including some permanent members, would not authorise its ill-conceived invasion plans.

Millions of words have been written and much blood has been shed over the Iraq war. Therefore, I do not propose to discuss this war in any detail. It may interest you to know, however, that the invasion has been characterised by most of the leading international lawyers and foreign policy scholars around the world as both illegal and illegitimate.

Today, I simply want to highlight the Iraq war as a classic illustration of what dire consequences can follow when a State disregards the UN's multilateral framework and uses force unilaterally. Let me explain what I mean. The US and the UK gave four reasons for the invasion:

First, Iraq possessed WMDs that posed a serious risk to the national security of the US, particularly if such weapons came into the hands of terrorists. Therefore, it was argued that the US would be justified to exercise a pre-emptive right of self-defence against a possible future attack by Iraq. After extensive inspections following the invasion, both by the UN's and the US's own inspectors, no WMDs were found nor was any evidence uncovered to disclose the imminence of any attack on the US.

Second, the invasion was a direct response to Iraq's alleged links to Al Qaeda and the September 11 terrorist attacks although no Iraqis were involved in the attacks. These links were challenged in many quarters, even within the US, before the invasion and subsequently rejected by the US's own bilateral 9/11 Commission.

Third, the invaders wanted to effect regime change. There is absolutely no rule in international law that justifies unilateral action by one State to replace the government of another because it finds the

regime of the latter not to its taste or liking. If there were such a rule, there would be a huge traffic congestion of nations lining up simply to change regimes they did not like in neighboring countries.

Fourth, the invaders desired to bring democracy to Iraq after many years of dictatorial rule and oppression by Saddam Hussein. Here again, there is no rule of international law that justifies action by one State against another to introduce democracy. If there were such a rule, there is any number of States that would qualify as future targets for military invasion. I am sure that you will agree that democracy cannot be introduced in any country at the end of a bayonet, or by bombs and brigades. History has shown us repeatedly that democracy must be cultivated and home-grown if it is to take root, grow and flourish.

The case of Iraq powerfully points to the enormous dangers of unilateral military action undertaken in haste, without prior investigation of the facts and without any legal basis. If the principles of international law set out in the UN Charter had been followed, if the inspections had been allowed to continue, if the 9/11 Commission had been allowed time to complete their investigations, the Security Council would have found out that there were no WMDs in Iraq, that Saddam Hussein was not involved with the 9/11 terrorist attacks, and that therefore there was no imminent threat to the national security of the US. In short, there was no legal basis under international law for the exercise of a right of self-defence, let alone a pre-emptive right of self-defence, against that country.

Sadly, the clock cannot be turned back on the Iraq war but the losses incurred – deaths running into hundreds of thousands, displacement, and destruction of property – have been enormous. A very heavy price to pay for a disastrous mistake!

The failure of the "Coalition of the Willing" to comply with the principles of international law enshrined in the Charter has only served to raise questions anew about what were the real reasons for this war. Just a few weeks ago, Alan Greenspan, the respected former Chairman

of the Federal Reserve Board of the US stated that this war was all about oil.

3. The "war on terror"

Let me say loudly and clearly at the outset that I condemn the horrendous act of terrorism perpetrated on 11 September 2001, and that those who planned and carried out this attack must be brought to justice.

At the same time, many people around the world remain puzzled and confused by this so-called "war on terror" or "war against terrorism" or "war against Islamic terrorism". Here are some of the reasons:

First, traditional international law has generally reserved the term "war" for acts of force unleashed by one State against another. This act of terrorism was committed by 19 individual hijackers on a suicide mission. It is difficult to understand why the response to this attack was shifted from the normal criminal law track to the path of an inter-State war.

Second, who is the enemy or target of this war, considering that the actual criminals perished with their crime? The world was told that Osama bin Laden and his associates hiding in mountain caves on the Afghan-Pakistan border were the brains behind this massacre. Yet, none of them has been caught or prosecuted. If Iraq was not involved, as we all know from the 9/11 Commission's report, who then is the enemy?

Third, in many different ways, this war on terror has been portrayed as the product of a "clash of civilisations" between the West with its Christian, democratic and capitalistic values and "Islamic terrorism" or "Islamo facism". This line of thinking has polarised countries to such a damaging extent that civilised discourse and diplomacy among countries have become very difficult.

All nations have been asked to join in this "war on terror", but most of them are still unclear how this act of terrorism in the US has become a worldwide problem. Most of them, especially developing countries like ours, face, not the threat of a sudden attack, but the daily reality of poverty, ignorance, preventable disease, and children dying from the lack of clean drinking water. There is more real suffering and death in these realities than in any ill-defined "war on terror."

Even the US's own 9/11 Commission has pointed to the urgent need to carefully study and address some of the root causes of terrorism, but sadly no serious efforts in this direction have been made. Various studies have shown that among the factors that have driven some people to terrorism are political grievances stemming from repressive regimes, feelings of alienation, humiliation, and marginalisation and exclusion arising from the impact of globalisation and capitalism. It is also difficult to understand and accept that the Palestinians remain under a state of siege and oppression after so many years with no clear prospect in sight for their own State.

4. Torture

In connection with the Iraq war, the world has been outraged to read about and view the shocking photographs of the acts of torture that have been committed against prisoners held in the Abu Ghraib prison in Iraq.

What took place at Abu Ghraib violated the principles of international humanitarian law as set out in the *Third Geneva Convention of 1949*. Yet, the US argued that the prisoners in question are unlawful enemy combatants and as such are not entitled to the protections offered by this *Geneva Convention*.

Even if that were the case, the acts of torture still violated the prohibition against "torture" set out in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Torture Convention)*, to which the US is also a party. The definition of "torture" in this Convention is very simple: it is any act

by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as interrogation or punishment.

Yet, the US Department of Justice invented a tortuous new definition of "torture" out of whole cloth. Torture, they said, must be "generally of the kind difficult for the victim to endure" and, "where the pain ... must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure." By using their own new definition of torture, the US government was saying that their unique interrogation methods did not amount to torture. This revised definition was criticised and rejected by most international legal experts and was subsequently withdrawn.

Numerous questions have also been raised by international humanitarian organisations like the International Red Cross and Amnesty International about the mistreatment and abuse of prisoners held in Guantanamo Bay. They point to continuing acts of torture, the denial of access to legal counsel, denial of access to families, and the proposed trials of prisoners by military commissions. Fortunately, in a series of recent decisions, US courts have called on the US administration to improve the treatment of prisoners held at Guantanamo Bay including according them minimum legal rights and due process. British courts have also taken a similar stand.

The global prohibition against torture, under the *Torture Convention* and other treaties, also includes a ban on sending people to other countries where they would be tortured. Such transfers, which do not usually involve courts, are known legally as extraordinary "renditions" or more informally as the "outsourcing of torture". The frightening aspect of this practice is the total absence of due process. And even worse is the nightmarish situation of some people being arrested and sent by mistake to be tortured outside their country. There have been a number of such cases in the US and Canada.

5. Disarmament

To me, the single greatest threat facing our planet is the prospect of a nuclear holocaust. As more and more countries race to achieve nuclear capability, the risk of a nuclear disaster has increased significantly.

Weapons of mass destruction include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons and other weapons with effects comparable to those of the atom bomb. It is frightening to contemplate that a nuclear incident could occur under any number of possible scenarios: an irrational act of a political leader, an act of terrorism, a simple accident, a malfunction of command or control systems, a false alarm, miscalculation, or misperception that your enemy has detonated a nuclear weapon.

Although the elimination of WMDs has been on the agenda of the UN since its inception, only a handful of treaties and conventions have been signed including the *Treaty on the Non-Proliferation of Nuclear Weapons*, the *Comprehensive Nuclear Test Ban Treaty*, the *Biological and Toxin Weapons Convention* and the *Chemical Weapons Convention*. Progress in achieving disarmament in other areas has been painfully slow. Among the impediments to reaching consensus is the lack of clarity of the rules of the game. Big Powers are reluctant to give up their WMDs but they want other countries to do so. It also appears all right for India, Pakistan and Israel to have nuclear weapons, but not Iraq, Iran or North Korea.

In 1996, the World Court issued a guarded and qualified Advisory Opinion to the UN General Assembly on the question of the legality of the threat or use of nuclear weapons, indicating that such actions were illegal under certain limited circumstances. Clearly, political considerations held sway and the Court was understandably not prepared to go much further. The Court, however, stated that "there exists an obligation for countries to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

6. Environment

A raft of international treaties has been adopted since the mid-1970s to protect the environment of this planet. Among the areas covered by these treaties are biological diversity, the atmosphere, the oceans and seas, freshwater resources, hazardous substances and waste, and human rights and armed conflict.

The issue that has gripped the world's attention in recent years is the very serious threat posed by the depletion of the ozone layer. Even the non-believers are beginning to understand and acknowledge the great harm being done by ultraviolet radiation and greenhouse gases; and also the increasing risk of global warming or adverse climate changes posed by greenhouse gases.

The international law seeking to control or prevent these dangers includes the *1985 Vienna Convention for the Protection of the Ozone Layer* and the *1992 Framework Convention on Climate Change*. The *1997 Kyoto Protocol* to the *Climate Change Convention* then sought to establish benchmarks for the reduction in emissions of carbon dioxide.

In 2001, the US announced that it did not intend to ratify the *Kyoto Protocol* even though it had signed the *Protocol* in 1998. This was a severe blow to the international community's efforts because the US produces more than 25 per cent of the world's greenhouse gases. Fortunately, the *Kyoto Protocol* came into force in 2005 thanks to the ratification of other industrialised countries in Europe and Russia. But the success of this "war" against global warming will be significantly diminished by the absence of the US. A total of 174 countries have already ratified this Protocol. It is about time that the US did so to demonstrate its commitment and partnership to protect the environment. Failure to act in a timely manner to eliminate the risks facing us may seriously imperil life on this planet for future generations

We in Asia, with our galloping economies, must also assume responsibility for ensuring proper stewardship of our environment. We

have a chance to learn and leapfrog over the mistakes of the more developed countries, not travel the same road.

The Way Forward

After the rather dismal picture I have painted about the state of international law today, you have every right to ask: Where do we go from here? What needs to be done to reaffirm the Rule of Law in international relations? Here are some of my suggestions for urgent action:

1. *Clarify the criteria for international community-based enforcement measures, under Chapter VII of the UN Charter, to stop human rights catastrophes*

The time has finally arrived when the international community (through the UN) needs to serve notice on States and their political and military leaders that it will not hesitate to embark on enforcement measures in the larger community interest where (i) the violations are so great as to constitute genocide, war crimes and crimes against humanity, thereby affecting international peace and security; and (ii) the State concerned fails to act. To this end, the UN Security Council and the General Assembly need to move forward with all deliberate speed to adopt a new Convention or a Declaration of Principles spelling out the criteria for the exercise of the proposed Responsibility to Protect.

2. *Clarify the rules on the use of force by States to distinguish between legitimate and illegitimate uses of force*

The practice, both within the UN and in unilateral uses of force, reveals considerable ambiguity or lack of clarity on the rules relating to the use of force. Notable among these are the recent claims and controversy relating to the exercise of a pre-emptive or anticipatory right of self-defence. It is imperative, therefore, for the UN to act soon. This may be a tall order because crisis situations vary from case to case and it may, therefore, be difficult to establish in advance and apply any such criteria. Nevertheless, it would be helpful to make

a start at clarifying the criteria, as the UN has done in several other previous Declarations of the principles of international law such as those on aggression and self-determination. Such criteria must also once again reinforce the Charter principle that all uses of force must only be undertaken with the prior authorisation of the Security Council except in the extreme case of self-defence against an actual or imminent armed attack.

In cases of serious crises, where the Security Council fails to exercise its primary responsibility due to the exercise of the veto, the UN General Assembly, as the forum representing the universal membership and voice of the community of nations, should step in pursuant to its shared role for the maintenance of international peace and security under the Charter. The case for more Uniting for Peace "enforcement" actions is becoming clearer in the light of experience.

3. *Clarify the rules regarding the prohibition of torture by specifying in crystal clear terms the specific types of acts that are banned*

As in the case of the threat or use of force, there is apparently some ambiguity or confusion, at least in certain quarters, as to what acts constitute torture. It is necessary, therefore, for the United Nations to prepare more detailed guidelines on this subject, including the enumeration of prohibited acts, to prevent further abuses.

4. *Transform the "war on terror" into a war to address the root causes of terrorism*

The UN and the international development institutions should take the lead in addressing the root causes of terrorism through increased assistance to countries where it is needed. To borrow the words of Professor Jeffrey Sachs, the use of "weapons of mass salvation" is likely to be more effective than weapons of mass destruction. The trillions of dollars that are now directed towards the development and use of instruments of war should be redirected towards much-needed development efforts.

5. *Move forward with all deliberate speed towards disarmament and elimination of nuclear weapons including WMDs*

The dangers of a nuclear holocaust have become more real and immediate in recent years, especially with the entry of dangerous new non-State actors like terrorists. The international community, acting through the UN, needs to move quickly towards further agreements on disarmament and elimination of WMDs. In doing so, countries should establish more equitable rules and also find ways to permit the peaceful development of nuclear energy. The current impasse in disarmament talks cannot be allowed to continue. Let us not delay action or wait to act until some rogue State or terrorist group decides to detonate one of these deadly instruments of death and destruction.

6. *Reform the governance structures of international organisations to reflect the realities of the new world order*

It is clear that a major source of the problem of non-compliance with international law is the current inequitable structures of governance in the UN and other international organisations. They reflect power-sharing formulas of a bygone era and are no longer acceptable. Former colonial powers continue to exert excessive power and influence that is disproportionate to the realities of the new world order. Inequitable power structures result in inequitable policies and decisions that tend to favour the rich and the powerful. I know this first-hand as I have worked in three leading international organisations.

At the UN, it would be politically unrealistic to expect the five permanent members of the Security Council to give up their vetoes. But there is absolutely no excuse for further delay in implementing current proposals for the enlargement of the Security Council to reflect the realities of the new world order. Such reforms may include new permanent members like India, Japan, Germany and Brazil. It would also be helpful to establish some clear criteria or guidelines for the exercise of the vetoes in the Security Council to prevent abuse or paralysis in action when a large majority of the Council members wishes to act on an urgent matter of international peace and security.

7. *Move without further delay towards achieving a truly global consensus on preventing global warming by implementing the Kyoto Protocol*

The United States must demonstrate leadership in this area and honour its commitments to implement agreed benchmarks for the reduction of greenhouse gases.

Finally, we should also administer a "national mirror test" to our own country, Malaysia, to see how and what we are doing to respect the Rule of Law. If we are intent on moving towards a more just world, we must all take responsibility for our corner of the planet. We often speak proudly of our Asian values. But we need to ask ourselves: How much progress have we ourselves made to uphold the principles of law and justice?

Are we, as a nation, properly mindful of the needs of the poorest of the poor among us? Is wealth being distributed fairly? Are we doing enough to strengthen the independence of our judiciary, as the guardians of the human rights of our citizens? Our moral authority and ability to play an effective role internationally will be strengthened immeasurably if the world can see that this small country continues to be a model of peace, justice and freedom for all.

A genuine respect for the law in small places will ripple out to a genuine respect for the law on the world stage. This is a journey, not a destination. A journey on which we might well be guided not just by our lights and our aspirations, but also by the spirit and legacy of our peace-loving Bapak Malaysia.

Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place

Ramy Bulan*

> The whole of the land law in Sarawak has been and is based on the fundamental necessity for protecting native interests.
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> – Editor, *The Sarawak Gazette*, 1 April 1947 at p 57.

I. Introduction

The definition of law under Article 160(2) of the Federal Constitution, "includes written law, the common law in as far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law" in the Federation. Whilst customs, religion, land, forestry are matters that are within legislative jurisdiction of the states, in a state of emergency, Parliament may, under Article 150(5), make laws with respect to any matter, if it appears that the law is required. Clause 6A of art 150, however provides that this power does not extend to Malay *adat* and to any matter of native law and customs in the states of Sabah and Sarawak, underpinning the unique recognition that is intended for native law and customs, and consequently, the distinctive protection for rights based on customary laws.

Under s 3(1) of the Civil Law Act 1956 ("CLA"), the English common law is applied "so far only as the circumstances of the States on Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary". In Sarawak,

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